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SUPREME COURT, U. S.

No. 73-492

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

against

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

BRIEF OF FEDERAL REPUBLIC OF GERMANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Petition for a Writ of Certiorari by petitioner Kunstsammlungen zu Weimar (the "Kunstsammlungen") seeks review of a judgment[1] of the United States Court of Appeals for the Second Circuit of New York, affirming an order and judgment of the United States District Court for the Eastern District of New York[2] which denied the Kunstsammlungen's motion to intervene in an action

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[1] The Opinion of the United States Court of Appeals for the Second Circuit of New York is reported at 478 F. 2d 231 (2d Cir. 1973) and printed at pages 2a-5a of Appendix B annexed to the Petition for a Writ of Certiorari.

[2] The Opinion of the United States District Court for the Eastern District of New York is reported at 358 F. Supp. 747 (EDNY 1972) and printed at pages 6a-17a of Appendix C annexed to the Petition for a Writ of Certiorari.

commenced by respondent Federal Republic of Germany ("Federal Republic") seeking recovery of two oil paintings stolen from Germany after the cessation of hostilities in 1945, presently in the possession of respondent Edward I. Elicofon ("Elicofon"). Petitioner's duplicative complaint, as its motion to intervene seeking relief directed against Elicofon, was correspondingly dismissed.

Question Presented

Only one question need be answered in determining whether the Petition should be granted:

> Should this Court review a case where none of the factors designated in Rule 19 of the Supreme Court Rules is present and where both the Court of Appeals and the District Court found factually that Petitioner was an agency and instrumentality of an unrecognized foreign government and, accordingly, lacked litigant status?

Petitioner seeks to raise four other issues, all of which have been resolved in favor of Federal Republic by the Courts below, none of which need be answered unless this Court answers the threshold question in the affirmative. In that event, the additional questions presented are as follows:

> 1. Should this Court review a factual finding, based entirely upon the record, that the Kunstsammlungen was an agency or instrumentality of the German Democrat Republic, a non-recognized foreign government? and
>
> 2. Should this Court review an action concerning foreign policy determinations of the Executive manifested by the filing of a Suggestion of Interest which

expressly denies recognition of the East German regime?[3]

Statement of the Litigation

Respondent Federal Republic instituted its action on January 27, 1969, in the Eastern District of New York, seeking equitable replevin of two oil paintings of Hans and Felicitas Tucher (the "Duerer Paintings") attributed to the renowned German artist Albrecht Duerer during the year 1499.

The claim of the Grand Duchess of Saxony-Weimar rests on the assertion that the Duerer Paintings were constituents of an art collection belonging to the Duke of Sachsen-Weimar-Eisenach through whom the Grand Duchess receives her status.

Prior to the centralization of all German governmental functions under the Third Reich, the Duerer Paintings were part of a public art collection of the Federal German State of Thuringia, under the administration of the Staatliche Kunstsammlungen in Weimar,[4] an agency of the

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[3] The Suggestion of Interest of the United States filed in May of 1969 and re-affirmed by a letter of the Department of State dated July 31, 1972, states:

> "3. The United States Department of Justice has been requested by the Department of State to place on record before the Court the following views of the Executive Branch of the Government bearing on this litigation:
>
> '1. The United States Government does not recognize the East German regime.
>
> '2. The United States Government recognizes the Federal Republic of Germany as the only German Government entitled to speak for Germany as the representative of the German people in international affairs.
>
> '3. The United States Government recognizes the Federal Republic of Germany as entitled in this litigation to represent the Weimar Museum as trustee of its interest.' "

[4] "Staaliche Kunstsammlungen in Weimar" can be translated as "State Art Collection at Weimar".

government. During 1945, prior to the destruction of the Third Reich, the contents of the State Art Collection, including the Duerer Paintings, were removed to Castle Schwarzburg for safekeeping. During the occupation of that area by the armed forces of the United States and sometime prior to July 1, 1945, the Duerer Paintings were stolen. Twenty-one years later, during 1966, the Duerer Paintings reappeared in the possession of respondent Elicofon, a citizen of the United States and resident of the Eastern District of New York.

On April 14, 1969, petitioner, the Kunstsammlungen[5], alleging that it was the successor to the State Art Collection from which the Duerer Paintings were stolen, sought leave to intervene in the Federal Republic's action. The Kunstsammlungen, correspondingly, commenced a separate action against respondent Elicofon in the Eastern District of New York seeking the return of the Duerer Paintings.

The District Court denied the Kunstsammlungen leave to intervene and dismissed its action for want of litigant status as an agency and instrumentality of a non-recognized foreign government. *Federal Republic of Germany* v. *Elicofon,* 358 F. Supp. 747 (EDNY 1972). The Circuit Court of Appeals affirmed, Per Curiam, and denied petitioner's motion for rehearing and *in banc* consideration by orders dated June 18, 1973. *Kunstsammlungen Zu Weimar* v. *Elicofon,* 478 F. 2d 231 (2d Cir. 1973).

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[5] The Kunstsammlungen's purported intervenor status arose from an order of the Minister of Culture of the German Democratic Republic dated April 14, 1969, declaring "juristic person[age]" upon the Kunstsammlungen. In so far as said order was promulgated some four months subsequent to the institution of the Federal Republic's action, it is not surprising that the East German order was retroactive to January 1, 1969 in an obvious effort to overcome anticipated status problems.

The Nature of the Kunstsammlungen

During the period of Soviet occupation of the East German territories, the State Art Collection at Weimar came into the custody of the State of Thuringia[6] remaining in its custody until 1952.

On October 7, 1949, the German Democratic Republic ("GDR") was established in the East-German territories. On July 24, 1952, the Volkskammer ("Peoples Chamber"), which is the legislative organ of the GDR, abolished the States as political subdivisions and the State of Thuringia was divided into three counties ("Bezirke") and thirty-six districts ("Kreise"). The Volkskammer's enactment resulted in all publicly owned property ("people owned property"), including the State Art Collection, passing to the Socialist State. The administration and custodial functions of said art collection, subject to the ultimate control of the central government, came within the jurisdiction of the City of Weimar, a political subdivision of the GDR, and management of the art collection continued under the title "Staatliche Kunstsammlungen in Weimar".

On April 14, 1969, the GDR's Minister of Culture by order conferred the status of a "juristic person" on the Kunstsammlungen, retroactive to January 1, 1969. The Kunstsammlungen's Director, appointed and subject to dismissal by the Lord Mayor of the City of Weimar[7], was accorded the right to represent the Kunstsammlungen in legal matters before East German tribunals. Upon its own purported "juristic person[age]", as recited in the order of the GDR Minister of Culture, the Kunstsamm-

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[6] Respondent Federal Republic advises this Honorable Court that the State of Thuringia, created by the Soviet Military Administration in 1945, is not the legal successor to the former Federal German State of Thuringia.

[7] See Section 10 of the STATUT of the Weimar Art Collection at page 17a of Appendix C to the Petition for a Writ of Certiorari.

lungen seeks by the instant petition to have this Court reverse the factual findings of the Courts below that it is an agency and instrumentality of a non-recognized foreign government, afflicted with the identical infirmities.

Reasons for Denying the Writ

The decision of the Second Circuit Court of Appeals follows well-recognized and controlling precedent, does not conflict with decisions of this Court or of any other Circuit, and does not present any issue worthy of review by this Court.

I

The Court of Appeals for the Second Circuit correctly affirmed the District Court and denied petitioner's litigant status in accordance with controlling precedent.

Petitioner's argument that the Courts below engaged in "an abdication of judicial responsibilities" (Petition, p. 16) is but a desperate effort to circumvent the controlling precedents. It is well established that the determination of "[w]ho is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislature and executive departments of any government conclusively binds the judges, as well as all officers, citizens and subjects of that government". *Jones* v. *United States,* 137 U.S. 202, 212 (1890); *Guaranty Trust Co. of N.Y.* v. *United States,* 304 U.S. 126, 137 (1938). The underlying rationale of the Executive's prerogative of sovereign determination is the avoidance of an otherwise irreconcilable division between the executive and judicial departments of our government. *Williams* v. *The Suffolk Insurance Company,* 38 U.S. 415, 419 (1839).

That foreign nations are afforded the privilege of access to American courts rests on the premise of comity among sovereigns. The prevailing comity required to confer litigant status upon a foreign government is the comity of nations rather than the comity of courts. *The Bank of Augusta* v. *Earle,* 13 Pet. 519, 588 (1839).

Despite petitioner's urging, the Courts below refused to ignore the precedents that where a foreign government has not been recognized by the Executive there is an absence of comity of nations and such non-recognized foreign government is without litigant status affording it the privilege to sue in American courts. *Guaranty Trust Co. of N.Y.* v. *United States, supra* at 137; *Russian Socialist Federated Republic* v. *Cibrario,* 235 N.Y. 255, 263 (1923); *The Penza,* 277 Fed. 91, 94 (EDNY 1921); *The Rogdai,* 278 Fed. 295, 296 (ND Calif. 1921).

Indicative of the conformity existing among the various Circuits which respect the Executive's prerogative is the First Circuit's recognition that an agency and instrumentality of a non-recognized foreign government suffers from the identical infirmity as does its higher governmental body. In *P&E Shipping Corp.* v. *Banco Para El Comercio Ext. De Cuba,* 307 F. 2d 415, 417-18 (1st Cir. 1962), although itself turning upon an agency of a *recognized* foreign government with whom diplomatic relations had merely been severed, the First Circuit reviewed the applicable law relating to instrumentalities of non-recognized foreign governments:

> "What is the status of the Republic of Cuba as a state and its right to sue in our courts during the period of cessation of diplomatic relations? *If it is not permitted to sue, then it would seem that appellee should not have been permitted to bring the suit here in question for it appears that appellee is an agent or instrumentality of the Cuban government. If the real party in interest is not permitted to sue, then suit on its*

behalf, whether disclosed or undisclosed on the record, should not be countenanced. But the status of the Republic of Cuba in our courts is a matter for the determination by the Executive branch of our government. National City Bank of New York v. *Republic of China,* 348 U.S. 356, 358, 75 S. Ct. 423, 99 L.Ed. 389 (1955)" (Emphasis added).

In applying these fundamental principles, the Courts below initially determined that the GDR, had it attempted to litigate in its own name, lacked the requisite litigant status as a non-recognized foreign government; the subsequent determination was factual and, upon a substantial record, held that petitioner, the Kunstsammlungen, was but an agency and instrumentality of the GDR, suffering from the same infirmities which attached to its creator.

Petitioner in prophetic fashion makes reference to the GDR as a "foreign government not yet formally recognized" (Petition, p. 8), with the accompanying innuendo that recognition is imminent and certain. This innuendo of recognition is neither buttressed by the record nor any other factor having probative value.[8]

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[8] The Federal Republic specifically rejects the Kunstsammlungen's erroneous characterization that The Basic Treaty between the Federal Republic and the GDR establishes diplomatic relations between the parties. (See page 14, Footnote 6 of the Petition).

To the contrary, the Federal Republic states that the Basic Treaty does not change the status of the GDR vis-a-vis the Federal Republic. The GDR and the Federal Republic are not recognized foreign countries as between themselves. The Federal Republic not only fails to recognize the GDR from the level of international public law, but has repeatedly and continually denied its international recognition. Instead of mutual recognition within the meaning of international public law both the Federal Republic and the GDR now recognize the rights of the four occupying powers. The Basic Agreement does not even provide for the establishment of diplomatic relations but at Section 8 provides merely for the exchange of permanent representatives.

In short, the Basic Treaty has no affect upon non-recognition of the GDR by the United States.

Moreover, petitioner's reference that the GDR is a permanent observer in the United Nations does not afford a reason for the grant of the instant petition. Even should the GDR enjoy unfettered admission to the United Nations, such status does not result in recognition of that government by the United States which must alone determine its foreign policy.[9] *Restatement (Second), Foreign Relations Law of the United States,* § 105, Ch. 3, Reporter's Notes.

It is submitted that in view of the definitive Suggestion of Interest filed at the direction of the Executive which denies recognition of the GDR and its instrumentalities[10], reaffirmed as late as August 2, 1972, the instant Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit should be denied.

II

No important unsettled issues are raised by the decisions below.

Both the Circuit Court of Appeals for the Second Circuit and the District Court for the Eastern District of New York applied the established law and correctly concluded that petitioner lacked litigant status as an instrumentality of a non-recognized foreign government. This issue is not one of great moment or precedential value insofar as this Court has definitively passed upon the infirmities which attach to non-recognized foreign governments.

Even petitioner's charge that the Courts below misread *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 11 L. Ed. 2d 804 (1964) does not warrant the granting of the instant Petition. The Kunstsammlungen, quoting out of context,

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[9] Although Albania is a member of the United Nations, the Executive Department of the United States does not recognize the regime of the government of Albania.

[10] See text of Suggestion of Interest of the United States recited at Footnote 3, *supra,* and Footnote 12, *infra.*

argues that *Sabbatino* declares that "the courts of this country should be closed to the government of a foreign state . . . [only if] the underlying reason [for doing so] is one of national policy transcending the interests of the parties to the action . . ." 376 U.S. at 408. However, what petitioner fails to advise this Court is that Mr. Justice Harlan in making that statement was specifically addressing himself to the *rejection* of an argument which reasoned that litigant status be denied Cuba on the grounds that it "is an unfriendly power and does not permit nationals of this country to obtain relief in its courts". 376 U.S. at 408. The Courts below did *not* rest their decisions upon the unfriendliness of the GDR or non-reciprocity of judicial access, but upon the premise that a non-recognized foreign government and its instrumentalities are not afforded the privilege of access to American Courts—particularly where the Executive has made such foreign policy determination known to the Judiciary.

Sabbatino clearly turned upon the recognized status of Cuba, with whom United States diplomatic relations had been severed as distinguished from a foreign policy determination of *non-recognition* as exists with respect to the GDR:

> "It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control, see Russian Republic v. Cibrario, supra, 235 NY at 260-263, 139 NE, at 261-263. Political recognition is exclusively a function of the Executive. The possible incongruity of judicial 'recognition' by permitting suit, of a government not recognized by the Executive is completely absent when merely diplomatic relations are broken." 376 U.S. at 410-11.

The judicial scrutiny afforded the Kunstsammlungen by the Courts below, both reaching the same factual findings and legal conclusions, has been more than sufficient. This Petition seeks to have this Court reject all established precedents, as an accommodation to the East German regime, and should be denied.

III

The Courts below correctly held that the 1923 Treaty affords the Kunstsammlungen no greater rights than those possessed by its creator, the GDR.

Petitioner's reliance on the 1923 Treaty of Friendship Commerce and Consular Rights, 44 Stat. 2132 (1927), T.S. No. 725, is misplaced and has rightfully been rejected by the lower Courts.

The Kunstsammlungen's reliance upon *Zschernig* v. *Miller,* 389 U.S. 429 (1968) for the proposition that the 1923 Treaty has survived the war and is applicable to the East German territories does not negate the Kunstsammlungen's lack of litigant status as an instrumentality of a non-recognized foreign government. The issues of survival and application of the 1923 Treaty are irrelevant since the GDR itself cannot rely upon the Treaty to achieve litigant status. *Guaranty Trust Co. of N. Y.* v. *United States, supra* at 137-38; *Russian Socialist Federated Soviet Republic* v. *Cibrario, supra* at 263; *The Penza, supra* at 94; *The Rodgai, supra* at 296. Similarly, a non-recognized foreign government cannot by its own creation of a purported juristic entity be permitted to effortlessly frustrate the Executive's foreign policy determination and thereby avoid all corresponding infirmities. The District Court correctly opined that to hold otherwise "would permit non-recognized governments to use our courts at will by creating 'juridical entities' whenever the need arises. 358 F. Supp. at 757.[11]

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[11] See pages 14a-15a of Appendix C annexed to the Petition for a Writ of Certiorari.

As this Court, in *Clark* v. *Allen*, 331 U.S. 503, 508-09 (1964), has itself observed "the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of the Treaty in whole or in part". It is submitted that this Court should deny the Kunstsammlungen's Petition which, upon the premise of the 1923 Treaty or otherwise, seeks merely to frustrate the Executive's prerogative to guide and implement the foreign policy and international affairs of the United States.[12]

IV

The Court of Appeals for the Second Circuit correctly rejected the fictional argument that the Kunstsammlungen is an instrumentality of the USSR.

The Kunstsammlungen's fictional argument that it is a sub-instrumentality of the USSR, a recognized foreign government, is nothing less than a disingenious attempt to pierce the sovereign veil.

It is beyond contest that the USSR itself recognizes the GDR as the sovereign of the East German territories with

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[12] In pertinent part, a letter of the Department of State attached as an appendix to Memorandum, dated August 2, 1972, submitted by the U.S. Attorney for the Eastern District of New York, states:

> "2. The Department of State refers to its letter of May 13, 1969, the Suggestion of Interest of the United States and the Memorandum in Support of the Suggestion of Interest of the United States, filed July 2, 1969 in action No. 69-C-93 by the Department of Justice. As stated in numbered paragraph 1 of our letter of May 13, 1969, the Department of State does not recognize the East German regime. Further, as stated in paragraph 2 of the Memorandum, the privilege of bringing suit in the United States is accorded only to foreign states recognized by the Executive, or the agencies or instrumentalities of such states. It is our view that Article XII of the 1923 Treaty does not require that the privilege of bringing suit be accorded to the East German regime or an agency or instrumentality of that regime, regardless of the juridical form which such agency or instrumentality may have under the laws of the East German regime."

whom the USSR has the same relationship as it has with other sovereign states. Mann, *Germany's Present Legal Status Revisited,* 16 Int. & Comp. L. Q. 760, 770 (1967).

By a Treaty of September 20, 1955, the USSR and the GDR confirmed that "the relations between them are based on complete equality of rights, mutual respect of sovereignty and the non-interference in international affairs." *Documents on Germany,* 274, 1944-1970, Senate Comm. on For. Rel., 92 Cong. 1st Sess. (1971). The tenuity of the Kunstsammlungen's USSR fiction is evidenced by the fact that such fiction was not even included as a predicate of status in either the Kunstsammlungen's motion to intervene or in its independent action.

A Petition for a Writ of Certiorari should not be granted upon a fiction of sovereignty, which fiction expressly conflicts with the Executive's foreign policy determination, transcending pure legal doctrines, that the GDR (and its instrumentality the Kunstsammlungen), a non-recognized foreign government, is without the privilege of access to American courts.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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